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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

LI YING HUA, LI ZHENG ZHE and XU JING JI,) CASE NO. CV 05-0019

Plaintiffs,)

vs.)

JUNG JIN CORPORATION, a CNMI corporation,)
ASIA ENTERPRISES, INC., a CNMI corporation,)
PARK HWA SUN and KIM HANG KWON,)
KSK CORPORATION, a CNMI corporation, and)
KIM KI SUNG,)

Defendants.)

PLAINTIFFS' REPLY
MEMORANDUM RE: MOTION FOR
SUMMARY JUDGMENT AGAINST
KSK CORP. AND KIM KI SUNG

Date: Thursday, July 17, 2008

Time: 8:30 a.m.

Judge: Hon. Alex R. Munson, Chief Judge

Plaintiffs, by and through their undersigned attorney of record, hereby file this Reply Memorandum in response to the Opposition of Defendants KSK Corporation and Kim Ki Sung (collectively "KSK" herein unless otherwise noted) to Plaintiffs' Motion for Summary Judgment on their claims against those Defendants.¹ As discussed below, Defendants have failed to show that there is any genuine issue of material fact for which their needs to be a bench trial in this matter. Defendants have also failed to rebut that Plaintiffs are, as a matter of law, entitled to the relief against Defendants they seek. Accordingly, summary judgment against KSK Corporation its alter

¹ It should be noted that Kim Sung Eun is not a party to this action.

1 ego Kim Ki Sung should be granted.

2
3 A. KSK AND KIM FALL FAR SHORT OF THEIR BURDEN ON A MOTION FOR
4 SUMMARY JUDGMENT.

5 The summary-judgment procedure authorized by Rule 56 is a method for
6 promptly disposing of actions in which there is no genuine issue as to any material fact
7 or in which only a question of law is involved. Thus, parties need not wait until a case
8 is fully tried but may seek a final adjudication of the action by a motion under Rule
9 56. In this way, dilatory tactics resulting from the assertion of unfounded claims or
10 the interposition of specious denials or sham defenses can be defeated, parties may
be accorded expeditious justice, and some of the pressure on court dockets may be
alleviated.

11 10A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2712 (Purpose, Scope and
12 Construction of Rule 56). *See also Meiri v. Dacon*, 759 F.2d 989, 998 (2nd Cir. 1985) (salutary
13 purpose of summary judgment is to avoid protracted, expensive and harassing trials).

14 As explained by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct.
15 2505, 91 L.Ed.2d 202 (1986) a dispute about a material fact is “genuine” only if “the evidence is such
16 that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248, 106 S.Ct. 2505.

17 The nonmoving party “must do more than simply show that there is some metaphysical doubt
18 as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106
19 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Conclusory, speculative testimony in affidavits and moving
20 papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Nelson v.*
21 *Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir.1996) (“[M]ere allegation and speculation
22 do not create a factual dispute for purposes of summary judgment”); *Thornhill Pub. Co., Inc. v. GTE*
23 *Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

24 Here, KSK has provided the Court with a “Statement of Disputed Facts.” See Doc. # 226.
25 Nowhere in KSK’s Statement of Disputed Facts, however, does KSK cite to any portion of the record
26
27

1 in this case (a substantial evidentiary record has been provided by Plaintiffs), nor does KSK provide
2 any relevant evidence to support its conclusory assertions regarding “disputed facts” or explain why
3 certain alleged facts are “material.” Indeed, a review of KSK’s conclusory assertions reveals that many
4 of the “facts” cited by KSK are either not disputed by Plaintiffs, are not material to Plaintiffs claims,
5 are not really facts at all, but ultimate legal questions.²

6 Indeed, KSK’s allegedly disputed “facts” in large part are really only unfounded “conclusions”
7 based on facts not identified by KSK in its opposition. For example, KSK’s proposed disputed fact
8 number 1 is “[w]hether KSK is a successor employer for any of the plaintiffs.” To answer that
9 legal question, the Court must look at the facts in evidence in this matter and apply the law of FLSA
10 successor liability as espoused in *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995). KSK’s fact
11 number 1 is not a fact at all; it is a disputed legal contention. *See also* Statement of Disputed Facts
12 Number 8 (“Whether KSK taking possession of the Welcome assets constitutes a fraudulent
13 conveyance?”).

14 A review of the rest of KSK’s purported “disputed material facts” militates the same
15 conclusion. At most, KSK proffers the initial question as to what the facts may or may not reveal —
16 statements of issues more appropriate in a case management conference statement than in response
17 to a motion for summary judgment. Plaintiffs, on the other hand, have introduced substantial
18 admissible evidence to support their claims — evidence to answer the many questions posed by
19 KSK’s Statement of Disputed Material Facts.

20 In the face of the substantial evidence to support the contentions and conclusions advanced
21

22 ² For example, KSK alleges that a disputed material fact is whether any of the plaintiffs
23 performed services for Welcome Poker or Welcome Laundry. *See* Statement of Disputed Facts, ¶
24 3. Notwithstanding that Li Zheng Zhe’s uncontested testimony is that he did perform services for
25 Welcome Laundry, such facts are not determinative of Plaintiffs’ claims. All three plaintiffs worked
26 for the enterprise that ran the establishments. That is the relevant and material fact that cannot be
27 disputed.

1 by Plaintiffs in their moving papers, it is not enough for KSK to suggest that it disagrees with the
2 contentions and conclusions; KSK has the obligation to point to specific evidence the creates a
3 genuine dispute of material fact. *See, e.g., Aprin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
4 922 (9th Cir. 2001) (non-movant's conclusory allegations unsupported by factual data was insufficient
5 to defeat motion for summary judgment).

6 Indeed, one would question what new facts would come from a trial when there have already
7 been two depositions of Kim Ki Sung, one of Kim Sung Eun, one each of the Plaintiffs and several
8 other depositions, all of which are in the record. What evidence would KSK contest at trial? What
9 new development of facts could KSK expect to present at trial? Why did KSK not contest evidence
10 or present the new evidence in opposition to the present motion for summary judgment?

11 In this regard, KSK has utterly failed to create a genuine dispute as to the facts. To allow such
12 factually unsubstantiated, conclusory allegations to prevail over a well supported motion for summary
13 judgment will lead to needless, protracted litigation over facts about which there are not nor can
14 there be any dispute.

15
16 C. THE LEGAL CONCLUSION TO BE DRAWN FROM THE UNDISPUTED FACTS IS
17 THAT KSK AND KIM ARE SUCCESSORS TO THE LIABILITY OF THE JUDGMENT
18 DEBTORS.

19 1. *KSK is a Bona Fide Successor of the Judgment Debtor enterprise.*

20 First, to be clear, the Judgment Debtors have been adjudged one enterprise. *See* first Proposed
21 Findings of Uncontroverted Fact, ¶¶ 10, 106-118, Doc. # 76; Order Granting Plaintiffs' Motion for
22 Summary Judgment, August 14, 2006, Doc. # 87. That Welcome Poker and Welcome Laundry were
23 wholly owned business establishments of that enterprise and that KSK purchased and is in possession
24 of those business establishments is not disputed. Whether Plaintiffs performed services for those
25 particular business establishments is irrelevant to this Court's inquiry; Plaintiffs were employees of
26 the enterprise that was the Judgment Debtors.' *Id.*, ¶¶ 17-39 (Li Ying Hua); 40-62 (Xu Jing Ji); and
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1 63-85 (Li Zheng Zhe).

2 Plaintiffs obtained a judgment under the Fair Labor Standards Act against the Judgment
3 Debtors. Judgment, August 24, 2006, Doc. # 93. The Judgment Debtors transferred substantially
4 all of their business assets (the Welcome establishments *in toto*) to KSK which left Judgment
5 Debtors insolvent. PFF ¶¶ 86-93, 94-100; 126-136. Those are the facts. The law applied to those
6 facts requires a finding that KSK is *bona fide* successor within the meaning of *Steinbach v. Hubbard*,
7 51 F.3d 843, 846-847 (9th Cir. 1995).

8 On the facts of this case, the authority cited by KSK is inapposite: *Sullivan v. Dollar Tree*,
9 2008 WL 1730079 at * 1 (alleged successor defendant had only purchased lease of bankrupt, but all
10 other assets were purchased by others); *NLRB v. Jarm Enters., Inc.*, 785 F.2d 195, 197 (7th Cir. 1986)
11 (finding of “successor employer” upheld); *Bates v. Pacific Maritime Assoc.*, 744 F.2d 705, 709
12 (successor employer upheld finding: “In the context of NLRA obligations, successor employers may
13 be required to remedy their predecessor’s unfair labor practices on a broad scale. [citation omitted]”).

14 Further, the case of *Rego v. ARC Water Treatment Co. of Pennsylvania*, 181 F.3d 396, 402-403
15 (3rd Cir. 1999) actually highlights the situation where an employee is left without recourse:

16 This case does not involve the usual situation in which a
17 predecessor employer transfers its assets to a single successor. In that
18 circumstance, fairness may require that the successor be liable for its
19 predecessor’s discriminatory acts, for otherwise the injured employee
20 may be left without a party against whom the employee may assert his
21 claim.

22 In *Rego*, determinative factors were: (1) the employee continued to work for the business that
23 took over half of the assets of the company, and (2) the employee had not filed a case before the
24 assets of the company were split and sold off. See 181 F.3d at 403.

25 The analysis performed in successor liability cases can be done in here based on the
26 uncontroverted facts of this case. A trial does not need to be held to apply the legal concepts of
27

1 successor liability.

2 It is also a factual error for KSK to suggest that KSK did not obtain substantial assets of
3 Judgment Debtors. See Opposition at 6-8. In its opposition, KSK suggests that it didn't obtain
4 "substantially all of the assets" of Judgment Debtors and therefore cannot be considered a successor,
5 but it cites to four cases that cite the standard as "substantial assets." *Id.*

6 First, Plaintiffs would note that it was they that have claimed that KSK is in receipt of
7 "substantial all of the operating assets of the Judgment Debtors" which comports with the facts of
8 this case. Further, Plaintiffs have provided admissible evidence of all of the facts relevant to a
9 determination of the substantial assets that were transferred to KSK, and minimal business and non-
10 business assets that remained with Judgment Debtors in Commonwealth. PFF ¶¶ 86-93, 94-100;
11 126-136.

12 Again, there is no dispute as to the facts in evidence, only as to the conclusions to be drawn
13 from those facts. Plaintiffs respectfully suggest that the facts demonstrate that, as a matter of law,
14 KSK is the successor to the business of the Judgment Debtors.

15
16 *2. KSK had Notice of Plaintiffs' Claims of the Judgment Debtors Prior to Its Acquisition of*
17 *Judgment Debtors Businesses.*

18 In its moving papers, Plaintiffs pointed to all of the facts that showed that Kim Ki Sung knew
19 about Plaintiffs lawsuit (PFF ¶ 85) and even knew about the Judgment Debtors advertised fire sale
20 (PFF ¶¶ 86-89). Interestingly, though Kim Ki Sung submitted a declaration with KSK's opposition
21 to Plaintiffs' motion for summary judgment, he did not take the opportunity to introduce facts that
22 would suggest that Kim Ki Sung did not have the requisite knowledge for him, or his company KSK
23 for whom he is the "general manager," to be held liable as a successor. It is also worth mention that,
24 as Kim Ki Sung recognizes in his opposition, two of the Plaintiffs worked for Daora Poker prior to
25 their termination and lawsuit — Daora Poker being a partnership between Judgment Debtors and
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1 Kim Ki Sung further bolstering Kim Ki Sung's knowledge of the underlying facts of Plaintiffs' claims.

2 Further, without citation to any authority, KSK argues that its interest in the Judgment
3 Debtors' assets arose prior to its notice of Plaintiffs' claims. See Opposition at 9-10. It appears that
4 KSK is arguing that the document they are calling the promissory note (Exhibit D to the March 9,
5 2006 Deposition of Kim Ki Sung, Doc. # 70) somehow created a security interest in the Judgment
6 Debtors' property. Again, this is not a factual dispute; it is a legal question.³

7 In any case, given the facts before the Court, particularly the substantial evidence in the
8 record that there was no perfected security interest in any of the Judgment Debtors assets, KSK's
9 misplaced argument has no import here.

10 Here, knowledge of Plaintiffs' case prior to the transfer of assets to KSK not, as argued, prior
11 to promissory note, is the relevant knowledge. It is not disputed that Kim Ki Sung knew of the claims
12 and simply chose not to believe Plaintiffs or look any further into the matter.

13
14 3. *Judgment Debtors are Unable to Provide Adequate Relief Directly.*

15 Again, KSK interposes conclusions rather than contradictory facts in its attempts to avoid
16 summary judgment. However, KSK has again failed to meet its burden in responding to this motion
17 and the facts presented by Plaintiffs. In its moving papers, Plaintiffs detailed its extensive collection
18 efforts. PFF ¶¶ 94-100. Plaintiffs identified the amounts still left to collect. *Id.* KSK has neither
19 challenged that evidence nor has KSK proffered evidence that does in any way suggest that the
20 Judgment Debtors are, indeed, able to provide adequate relief directly.

21 No new facts will come out at the trial in this matter. If there were going to come from KSK
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23
24 ³ There is also the *legal* question as to the effect, if any, of a security interest on successor
25 liability that KSK does not even offer to resolve. *But see Stoumbos v. Kilimnik*, 988 F.2d 949, 961-62
26 (9th Cir. 1993) (reversing on the issue of successor liability in commercial context holding that a
27 secured creditor can be considered a successor).

1 and Kim Ki Sung, they could have and should have come in response to this Motion. The question
2 before the Court is a question of law, not a question of facts. Plaintiffs' respectfully suggest that the
3 answer is that Plaintiffs, as a matter of law, have no adequate relief remaining against the Judgment
4 Debtors directly.

5
6 4. *Equity and Fairness.*

7 KSK knew of the claims of Plaintiffs. *See* sub-section 2, above. Just because it chose not to
8 believe in the efficacy of the claims does not make successor liability in the face of the probability
9 unfair or inequitable. Indeed, KSK was aware that the Judgment Debtors were trying to fire sell all
10 of their assets. *Id.* It does not comport with the facts to say that imposing liability on KSK for the
11 known liabilities of the Judgment Debtors is somehow unfair or inequitable. KSK was in the best
12 position to determine its exposure to liability. *See, e.g., Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 752
13 (7th Cir. 1985) (transferee has duty to enquire into the extent of potential liabilities).

14 Plaintiffs, on the other hand, have been substantially prejudiced by the concerted actions of
15 the Judgment Debtors and KSK in removing from Plaintiffs' reach substantially all of the Judgment
16 Debtors business assets — assets that are still making money for KSK while the Judgment Debtors
17 have indisputably fled to Korea. PFF ¶¶ 94-100.

18 In sum, Plaintiffs have introduced admissible, undisputed evidence of the facts necessary to
19 prove by a preponderance of the evidence the elements of KSK's successor liability in this case, both
20 under the FLSA successor concepts and in commercial successor liability, generally. KSK has not met
21 its burden of showing that there is any dispute as to any issue of material fact or that Plaintiff is not
22 entitled to a judgment as a matter of law. Accordingly, the Court should grant Plaintiffs' summary
23 judgment on its successor liability claims.
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1 D. ANOTHER LEGAL CONCLUSION TO BE DRAWN FROM THE UNDISPUTED FACTS
2 IS THAT KSK AND KIM ARE IN POSSESSION OF FRAUDULENTLY TRANSFERRED
3 ASSETS.

4 In its Opposition, KSK argues that it is a question of fact whether KSK is in receipt of
5 fraudulently transferred assets. KSK argues that Plaintiffs' argument is one involving the credibility
6 of Kim Ki Sung and is, therefore, inappropriate for consideration on a motion for summary judgment.
7 KSK has either refused to acknowledge the law or has grossly misread it.

8 As detailed at length in its Memorandum in Support of Summary Judgment, the common
9 law of fraudulent conveyances is the law applicable in the Commonwealth. *See* Memorandum in
10 Support at 19-23. At common law, once upon the presentation of "badges of fraud," the factual
11 burden shifts to the transferee of the subject property to substantiate by "significantly clear" evidence
12 the legitimacy of the transaction. *Acequia, Inc. v. Clinton*, 34 F.3d 800, 806 (9th Cir. 1994).

13 Here, again, Plaintiffs have provided a mountain of evidence in their moving papers as to the
14 myriad badges of fraud present in this case. *See* Memorandum in Support at 25-31. Legally (not
15 factually) the burden has shifted to KSK to come forward with significantly clear evidence (facts) of
16 the legitimacy of KSK's transactions with the Judgment Debtors. KSK, however, has failed to provide
17 any evidence whatsoever, much less the level of proof needed to overcome its burden at common law
18 that KSK's dealings with the Judgment Debtors were not fraudulent.

19 Here, because KSK has failed to meet its burden, the Court can rule as an alternative to
20 successor liability that KSK is in receipt of fraudulently transferred assets of Judgment Debtors and
21 void the transaction, returning the assets to the Judgment Debtors and within the reach of Plaintiffs'
22 collection efforts.⁴

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25 ⁴ In making this argument, it is not Plaintiffs' intent to undermine their position that KSK
26 is the successor to the liability of the Judgment Debtors. The fraudulent conveyance claim is an
27 alternative to finding KSK (and Kim Ki Sung as its alter ego) primarily liable for the Judgment in
favor of Plaintiffs.

1 E. ANOTHER LEGAL CONCLUSION TO BE DRAWN FROM THE UNDISPUTED FACTS
2 IS THAT KIM KI SUNG IS, INDEED, THE ALTER EGO OF KSK CORPORATION.

3 In its opposition, KSK offers nothing to refute, factually, the strong and substantial facts
4 presented by Plaintiffs — Kim Ki Sung’s own words among them — that necessitate a finding that
5 Kim Ki Sung is the alter ego of KSK Corporation. Indeed, KSK appears to rest its entire argument
6 in opposition on the misplaced application of the equitable doctrine of judicial estoppel.

7 KSK correctly cites that this equitable doctrine can be applied by a court where a party makes
8 “a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the
9 same proceeding or a prior one.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). What KSK
10 fails to provide the Court, whether by oversight or otherwise, are *the facts* — most importantly, dates.

11 Kim Ki Sung was deposed twice in this case. The first time he was deposed, Kim Ki Sung
12 appeared as a third party in response to a third party subpoena for his *wife* to appear for a deposition.
13 He was not a party to the action. That was March 9, 2006 — a year and half before Plaintiffs’ Second
14 Amended Verified Complaint was filed and an alter ego claim was brought against Kim Ki Sung for
15 which Plaintiffs now seek summary judgment.

16 In that deposition, to make it clear that Kim Ki Sung was not a party to the litigation, the
17 undersigned told him that Plaintiffs were not then bringing any claims against him — they didn’t yet
18 know that facts that eventually led them to the alter ego claim.

19 Contrary to KSK’s suggestion in its opposition, it is factually true that in March 2006,
20 Plaintiffs were not advancing claims for unpaid wages against Kim Ki Sung. Once Plaintiffs found
21 out that Kim Ki Sung and “his” company KSK were the benefactors of substantial assets of the
22 Judgment Debtors and that the Judgment Debtors left very little from which to collect the eventual
23 judgment Plaintiffs would obtain, Plaintiffs did then advance claims against Kim Ki Sung and his
24 company KSK. There is nothing at all inconsistent between the past assertion that Plaintiffs were
25 not, at that time, advancing claims against Kim Ki Sung, and the fact that they are now because
26 Plaintiffs’ understanding of Kim Ki Sung’s role in the case changed.

1 In any case, KSK has failed to cite to any case that prohibited an injured party from bringing
2 legitimate claims against responsible parties after it was discovered that the responsible parties were
3 legally liable. KSK certainly has not provided any authority that when a mountain of facts (mostly
4 by admissions from the party himself) lead to the singular conclusion that this person does not
5 separate himself — indeed, refuses to separate himself — from the identity of a corporate entity, that
6 any prior questioning would provide that party with a shield to assets that are, no doubt,
7 indistinguishable in ownership or, as is the case here, clearly acquisitions of the corporate entity and
8 not the individual “general manager.”

9 Importantly for this case in particular, and also tellingly on the issue of the alter ego claim,
10 a substantial amount of the assets purchased or paid for with KSK funds are currently in the personal
11 name of Kim Ki Sung, including, most recently, a change of the leases underlying Welcome Poker
12 and Welcome Laundry from KSK to Kim Ki Sung, personally. PFF ¶ 61. Indeed, this changed
13 happened while this lawsuit against KSK and Kim Ki Sung was pending *Id.*

14 Kim Ki Sung has done nothing to refute, factually, that he has not commingled his assets with
15 those of KSK; Plaintiffs have identified substantial evidence that he has as well as other evidence of
16 the indistinguishable relationship between Kim Ki Sung and his KSK. PFF ¶¶ 39-61. As a matter of
17 law based on the undisputed facts of this case, Kim Ki Sung is, indeed, the alter ego of KSK
18 Corporation and can and should be held jointly and severally liable for any liability KSK has to
19 Plaintiffs.
20

21 F. KSK AND KIM DO NOT APPEAR TO CONTEST PLAINTIFFS’ RIGHT TO
22 ATTORNEY’S FEES.

23 KSK does not address Plaintiffs’ claim for statutory attorney’s fees in these proceedings. As
24 stated in its moving papers, Plaintiffs are entitled to section 216(b) of the Fair Labor Standards Act,
25 29 U.S.C. §§ 201 *et seq.* See Memorandum in Support at 16.
26
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1 G. CONCLUSION

2 Despite the myriad of undisputed facts presented to the Court by Plaintiffs to support their
3 claims, the underlying facts of this matter are relatively simply and inescapable. The Judgment
4 Debtors owed Plaintiffs a substantial amount of unpaid wages and other damages under the federal
5 Fair Labor Standards Act. Instead of paying Plaintiffs, the Judgment Debtors transferred a
6 substantial amount of their assets — indeed almost all of their operating businesses — to KSK and
7 Kim Ki Sung and fled the country. The Judgment Debtors effectively sold a majority of their assets
8 to KSK and Kim Ki Sung and absconded. This sale has effectively undermined the collection of
9 Plaintiffs' statutory damage claims, enriching both the Judgment Debtors and KSK/Kim to the
10 detriment of Plaintiffs.

11 The Fair Labor Standards Act and the laws applying the Act, including the concept of FLSA
12 successor liability, militate that courts protect workers such as Plaintiffs from such opportunistic
13 transactions that serve only to divert assets of obligors and change the relative positions of the parties
14 solely to avoid federal statutory obligations.

15 Here, the burden was on KSK and Kim Ki Sung to bring forth facts to contradict the
16 undisputed facts presented by Plaintiffs. KSK and Kim Ki Sung did no more than interject various
17 assumptions and conclusions — they did *not* interject any contradictory facts. Indeed, it is difficult
18 to imagine what new facts will come about at a trial in this matter that have not already been
19 presented or could not have been presented in this motion.

20 Accordingly, given the undisputed facts of this case viewed in the light most favorable to KSK
21 and Kim Ki Sung, Plaintiffs are entitled to judgment as a matter of law as to the successor liability
22 of KSK and Kim Ki Sung, its alter ego, on their claims for successor liability and for fraudulent
23 conveyance.
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1 Respectfully submitted this 10th day of July, 2008.

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3 /s/ Mark B. Hanson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be deposited in the United States Post Office, first class mail, postage prepaid, addressed to the following:

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I further certify that the following were served with a copy of the foregoing via the Court's electronic case filing system:

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DATED: July 10, 2008

/s/ Mark B. Hanson

MARK B. HANSON